STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1715

State of Minnesota,
Respondent,

vs.

Dale David Smith,
Appellant.

Filed July 10, 2023
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-CR-18-131

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Bratvold, Judge.

SYLLABUS

When a defendant convicted of first-degree criminal sexual conduct (penetration, victim under 16, significant relationship, multiple acts over time) has a probation condition of no contact with females under 18, and that defendant has repeated contact with a female under 18, a district court does not abuse its discretion when it determines that the defendant's need for confinement outweighs the policies favoring probation because

confinement is necessary to protect the public from further criminal activity by the defendant.

OPINION

CONNOLLY, Judge

Appellant challenges the revocation of his probation and execution of his sentence, arguing that the district court abused its discretion by failing to provide factual reasons and providing legally incorrect reasons for the revocation. Because we see no abuse of discretion, we affirm.

FACTS

Between 2014 and 2017, appellant Dale Smith, then in his mid-sixties, lived with child A, then about 10 to 13 years old, and her mother. On multiple occasions, appellant digitally penetrated, performed oral sex on, and rubbed his genitals on Child A. In 2018, appellant pleaded guilty to first-degree criminal sexual conduct. The presumptive sentence was 144 months in prison; appellant intended to ask for a dispositional departure.

In accordance with the recommendation of the presentence investigation and pursuant to appellant's motion, the district court granted a dispositional departure and sentenced him to the presumptive 144 months in prison, stayed, and placed him on supervised probation for up to 30 years. As a condition of the stayed prison sentence, the district court ordered appellant to serve 364 days in custody in 30-day segments, at 90-day intervals. His probation conditions included completing an adult sex offender program; having no contact with Child A.; having no unsupervised contact with females under 18; and not owning, using, or possessing any sexually explicit materials.

In August 2022, appellant's probation agent received a letter from CORE Professional Services explaining why it was terminating appellant from its outpatient sex-offender-treatment program. The first reason was that

> [Appellant] has reported repeated contact with a minor female that visits his neighbor. He reported he has contact with this minor female when they are outside visiting. This is concerning as [appellant] has failed to set an appropriate boundary with this neighbor indicating he is not allowed to have contact with [female] minors. . . . [Appellant] has engaged in sexually abusive behavior against a prepubescent female. Therefore, having unsupervised contact with a minor female is extremely high risk and unsafe.

Based in part on this letter from CORE, appellant's probation agent drafted a probation-violation report alleging three violations of probation conditions: (1) appellant had violated the no-contact-with-females-under-the-age-of-18 condition by having repeated contact with a minor female who visited his neighbor, having contact with a minor granddaughter, and being alone with a minor female on a camping trip in the summer of 2021; (2) appellant had failed to complete the adult sex offender program because he had been terminated at CORE Professional Services for failing to work up to his abilities and make adequate progress toward discharge; and (3) appellant had used sexually explicit material by watching the movie *Drive Angry* knowing that it contained sexually explicit material. The probation agent recommended that probation be revoked and appellant's sentence be executed.

At the contested revocation hearing, appellant's probation agent testified about appellant's repeated unsupervised contact with the minor female who was visiting a neighbor.

> [T]he concern lies with [appellant] having contact – unsupervised contact with a minor female. This has been ongoing, and that boundary was not established early on in which [appellant] should have . . . indicated to . . . the child's parent that he cannot have contact with minor females. It gives the impression that that's grooming behavior.
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> . . . .
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> [Appellant] also reported to his treatment provider that he had repeated contact with a minor female that visits – that resides next to him.
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> . . . .
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> . . . [I]t would appear from a therapeutic standpoint . . . that this is potentially grooming a victim. And the neighbor minor appears to be about the same prepubescent age as [appellant's] victim, so that's obviously concerning that . . . this could result in further criminal activity.

When asked if appellant admitted that he knew he was not supposed to be having contact with minor females when he was having contact with them, he answered, "Yes."

After the hearing, the district court concluded that the state met its burden of proving that appellant's repeated contact with a minor female who visited his neighbor, his failure to complete sex-offender treatment, and his use of sexually-explicit material were intentional and inexcusable violations of his probation conditions and that the need for appellant's confinement outweighed the policies favoring probation. The district court therefore revoked appellant's probation and ordered that his sentence of 144 months in prison be executed.

ISSUE

Did the district court abuse its discretion in revoking appellant's probation?

ANALYSIS

"The [district] court has broad discretion in determining if there is sufficient evidence to revoke probation and should be reversed only if there is a clear abuse of that discretion." *State v. Austin*, 295 N.W.2d 246, 249-50 (Minn. 1980). But we review de novo whether the district court made the required findings to revoke probation. *State v. Modtland*, 695 N.W.2d 602, 605 (Minn. 2005).

A district court must consider and make specific determinations on the three *Austin* factors before revoking probation. *See Austin*, 295 N.W.2d at 250. The *Austin* factors require a district court to (1) "designate the specific condition or conditions that were violated," (2) "find that the violation was intentional or inexcusable," and (3) "find that need for confinement outweighs the policies favoring probation." *Id.* When analyzing the third *Austin* factor, district courts must balance "the probationer's interest in freedom and the state's interest in insuring his rehabilitation and the public safety." *Id.*

To make a finding on the third *Austin* factor, a district court weighs the three "*Modtland* subfactors": whether (1) "confinement is necessary to protect the public from further criminal activity by the offender," (2) "the offender is in need of correctional treatment which can most effectively be provided if [the offender] is confined," or (3) "it would unduly depreciate the seriousness of the violation if probation were not revoked." *Modtland*, 695 N.W.2d at 607 (quotation omitted). Only one *Modtland* subfactor is necessary to support revocation. *See Goldman v. Greenwood*, 748 N.W.2d 279, 283 (Minn. 2008) (stating that courts "normally interpret the conjunction 'or' as disjunctive rather than conjunctive").

District courts "should not assume that they have satisfied *Austin* by reciting the three factors and offering general, non-specific reasons for revocation." *Modtland*, 695 N.W.2d at 608. Therefore, district courts must make "thorough, fact-specific records" and "seek to convey their substantive reasons for revocation and the evidence relied upon." *Id.*

Appellant argues that the district court "failed to give an explicit, valid reason for revocation," specifically that its "finding on the third *Austin* factor [that the need for confinement outweighs the policies favoring probation] is insufficient" because "the only reason it did give was listing the number and type of violations." We disagree. The district court's analysis of appellant's probation violations demonstrates that probation, in appellant's case, was not an effective or reliable deterrent of further criminal activity.

Most significantly, the district court found that: (1) appellant had had "*repeated* contact with a minor female that visits his neighbor"; (2) the probation agent had testified that appellant and others in treatment had been taught that, "the first time this type of 'unavoidable' contact occurred, . . . they must be honest with neighbors and advise neighbors they simply cannot have *any* contact with minors, thereby setting appropriate boundaries"; (3) the probation agent's "testimony was consistent with the representations by CORE"; (4) the probation agent also testified "how these types of contacts readily turn into grooming behavior when young children are involved"; (5) appellant "offered no testimony/evidence that he did not know how to address this situation after the first contact"; and (6) the probation officer's testimony supports the finding that "the second and subsequent contacts with the minor [female] constitute an intentional and/or

inexcusable violation of probation."[1] These findings support the determination that appellant's need for confinement outweighed the policies favoring probation because it was necessary to protect the public from further criminal activity.

The district court also found that appellant had failed to complete sex offender programming in almost four years on probation, relying on the letter concerning appellant's discharge from the CORE program; it also found that appellant had used sexually explicit material, relying on the probation agent's testimony that appellant admitted he knew the movie "Drive Angry" was sexually explicit and watched it for that reason. These findings further support the determination that appellant's need for confinement outweighs the policies favoring probation.

Finally, appellant objects to the district court's statement that appellant had "*three* violations, none of which are technical in nature." He argues that his violations were technical under Minn. Stat. § 244.196, subd. 6, defining a technical violation as "any violation . . . except an allegation of a subsequent criminal act" and that the district court relied on the accumulation of three of them to revoke his probation, in violation of *Austin*, 295 N.W.2d at 251, ("[Revocation] cannot be a reflexive reaction to an accumulation of technical violations.").[2]

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[1] The district court did find that neither appellant's contact with his minor granddaughter nor the incident on a camping trip in 2021 had been shown to be intentional or inexcusable and noted that they were not a basis for the revocation.

[2] But *Austin* does not reference Minn. Stat. § 244.196, subd. 6 (2022), and *Riley v. State*, 792 N.W.2d 831 (Minn. 2011), *reconsideration granted and denied* (Minn. April 22, 2011), which appellant cites in support of the applicability of that statute, does not include the word "technical."

But when the district court described appellant's violations as "not technical in nature," it was observing that all appellant's violations were relevant to the crime of which he had been convicted, i.e., First Degree Criminal Sexual conduct—Penetration—Victim under 16—Significant Relationship—Multiple Acts Over Time, as opposed to mere violations of probation procedure, such as failing to meet with a probation officer or report for a scheduled test. In contrast, all of appellant's violations, particularly his repeated contact with a juvenile female and his failure to establish appropriate boundaries by notifying his neighbor that appellant was prohibited from any contact with minor females, support the district court's determinations that appellant's confinement is necessary to protect the public, *Modtland*, 695 N.W.2d at 607, and that his need for confinement outweighs the policies favoring probation, *Austin*, 295 N.W.2d at 250.

We close with one final note. Appellant at one point states, "For many, the result of watching *Drive Angry* was a disappointing trip to the theater. For [appellant,] it's twelve years in prison." We feel compelled to point out that appellant was not sent to prison for merely watching a movie. Appellant was convicted of repeatedly raping a child. He received probation and was ordered to have no contact with minors. He repeatedly had contact with a minor. If there is a more textbook application of the *Modtland* subfactor that confinement is necessary to protect the public from further criminal activity by appellant, we are hard pressed to think of one.

DECISION

Because appellant has not shown that the district court abused its discretion in revoking his probation on the basis of his violations of the conditions of probation, we

affirm the revocation. Furthermore, we hold that when a defendant has been convicted of criminal sexual conduct involving a minor and is placed on probation that includes as a condition that the defendant have no contact with a minor, the very fact that he continues to have contact with a minor satisfies the *Austin* factor that his need for confinement outweighs the policies favoring probation.

Affirmed.